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BEFORE THE
PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA

IN RE: Petition of US LEC of South Carolina Inc.)
For Arbitration of an Amendment to an)
Interconnection Agreement with BellSouth)
Telecommunications, Inc. Pursuant to)
Section 252(b) of the Communications Act)
Of 1934, as Amended)

Docket No. 2004-78-C

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DIRECT TESTIMONY OF
FRANK R. HOFFMANN, JR.
ON BEHALF OF US LEC SOUTH CAROLINA INC.

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1 **Q: PLEASE STATE YOUR NAME, TITLE, AND BUSINESS ADDRESS FOR**
2 **THE RECORD.**

3
4 **A:** My name is Frank R. Hoffmann, Jr. I am currently Director, Regulatory and
5 Industry Affairs for US LEC Corp., the parent company of US LEC of South
6 Carolina Inc. ("US LEC"), and its operating subsidiaries, including the Petitioner
7 in this proceeding. My business address is 6801 Morrison Boulevard, Charlotte,
8 North Carolina 28211.

9
10 **Q: PLEASE DESCRIBE YOUR RESPONSIBILITIES FOR US LEC.**

11
12 **A:** I am responsible for directing and coordinating all activities related to US LEC's
13 Local Interconnection and Termination Agreements and the management of these
14 agreements and relationships with local carriers, and industry organizations. I am
15 charged with ensuring that these agreements address and support the financial and
16 technological goals of the company for local service. My specific duties include
17 actual contract negotiations, staff support for these finalized agreements, day-to-
18 day coordination and point of escalation of service/billing affecting issues
19 surrounding these agreements.

20
21 **Q: PLEASE SUMMARIZE YOUR EDUCATIONAL BACKGROUND AND**
22 **PROFESSIONAL EXPERIENCE.**

A: I received a Bachelor of Science degree and a Masters of Business Administration degree from the University of Maryland, College Park, Maryland in 1986 and 1988, respectively. I was employed by Bell Atlantic, Inc., in Arlington, Virginia, from 1988 through 1996. During that period I held various positions within Service Costs, External Affairs, Carrier Relations, Marketing and Finance. My responsibilities during this period included cost of service studies, rate development and tariff administration, performance metrics, sales compensation, product management and interconnection agreement negotiations. From 1996 through 1998, I worked for Teleport Communications Group, in Baltimore, Maryland, and negotiated interconnection agreements and managed its relationship with BellSouth. In 1998, Teleport was acquired by AT&T, where I was responsible for collocation, interconnection trunking and E911 networks. In 1999, I went to work for TriVergent Communications, in Greenville, South Carolina, where I was responsible for all outside plant infrastructure build-out within ILEC central offices. In 2001, I joined a voice-over-IP telecommunications company, Cbeyond, Inc. My responsibilities included equipment engineering, vendor selection, procurement and inventory. In 2002, I came to US LEC, in Charlotte, North Carolina, to work in Industry Affairs, where I am currently employed.

Q: HAVE YOU PREVIOUSLY TESTIFIED BEFORE THE SOUTH
CAROLINA COMMISSION?

47 A: No. I have testified before the North Carolina Utilities Commission the
48 Massachusetts Department of Telecommunications and Energy, the Maryland
49 Public Service Commission, the Pennsylvania Public Utility Commission, and the
50 Florida Public Service Commission.

51

52 Q: HAVE YOU PARTICIPATED IN US LEC'S INTERCONNECTION
53 NEGOTIATIONS WITH BELL SOUTH, INCLUDING THE
54 NEGOTIATIONS OF THE SO-CALLED TRO AMENDMENT?

55

56 A: Yes, I have participated in the negotiating sessions. In addition, I have reviewed
57 the points of contention raised during the negotiations to ensure their consistency
58 with state and federal requirements and policy.

59

60 Q: WHAT IS THE PURPOSE OF YOUR TESTIMONY?

61

62 The purpose of my testimony is to explain what I understand to be the legal and
63 competitive policy arguments in support of US LEC's position on whether
64 BellSouth may impose non-recurring charges for conversion of wholesale
65 services to Network Elements or Network Elements to wholesale services (Issues
66 A-3 and A-19); the process for the performance of routine network modifications
67 by BellSouth and the costs that should be assessed for such performance (Issue A-
68 6); and, US LEC's right to adopt an existing approved interconnection agreement

without completing negotiations of an amendment for a change of law that may have occurred (Issue A-21).

ISSUE A-3 and A-19: CHARGES FOR THE CONVERSION OF WHOLESALE SERVICES TO NETWORK ELEMENTS OR NETWORK ELEMENTS TO WHOLESALE SERVICES

Q: PLEASE EXPLAIN WHY US LEC WOULD CONVERT WHOLESALE SERVICES TO UNBUNDLED NETWORK ELEMENTS OR A COMBINATION OF NETWORK ELEMENTS.

A: In certain circumstances, US LEC has elected not to provision, or may be unable to provision, a UNE or a combination of UNEs, such as an enhanced extend loop (“EEL”), from BellSouth, and orders the circuit from BellSouth’s special access tariff. The special access circuit may have a monthly recurring charge of 35%-40% more than a similar UNE or combinations of UNEs. Consequently, US LEC, to reduce its cost of service, may seek to convert one or more of these special access circuits (on which US LEC is providing local exchange services to its customers) from special access to a UNE or an EEL as permitted under the FCC’s rules (47 C.F.R. § 51.318).

91 **Q: WHAT IS YOUR UNDERSTANDING OF THE BELL SOUTH**
92 **CONVERSION PROCESS?**

93
94 **A:** The process is a “paper” conversion. No physical rearrangement of the circuit
95 occurs. There is no physical disconnection or reconnection of the circuit. Neither
96 BellSouth nor US LEC is required to dispatch technicians to complete a
97 conversion.

98
99 **Q: WHAT CHARGES IS BELL SOUTH SEEKING TO IMPOSE ON US LEC**
100 **FOR THIS CONVERSION PROCESS?**

101
102 **A:** BellSouth proposes to assess a “switch-as-is” charge, which is a
103 nonrecurring charge and is imposed on each circuit converted. The
104 “switch-as-is” charge is not a new charge and has been included in the
105 rates associated with Attachment 2 of the parties’ interconnection
106 agreement prior to the negotiations for the TRO Amendment.

107
108 **Q: WHY DOES US LEC BELIEVE THAT BELL SOUTH IS NO LONGER**
109 **ABLE TO ASSESS THE “SWITCH-AS-IS” CHARGE?**

110
111 **A:** Prior to the FCC’s decision in the *Triennial Review Order*, the FCC had not
112 spoken on whether a charge could be imposed for conversions from wholesale

services to UNEs/EELs or not. In the UNE Remand Order¹ and subsequently in its Supplemental Order² and the Supplemental Clarification Order,³ the FCC required EELs be made available and required ILECs to convert special access circuits to EELs, subject to certain restrictions. In neither of these FCC rulings did the FCC conclude whether the ILECs could charge the CLECs for such conversions or not. Consequently, each ILEC made its own decision on what it would charge for such conversions, if at all. Some ILECs, such as Verizon East, did not impose a charge for conversions; some ILECs, such as SBC, required CLECs to pay the non-recurring charges associated with ordering new services; and some ILECs, such as BellSouth, imposed a fee somewhere in the middle of the two – not quite the full non-recurring charges for new services, but certainly not a de minimus charge.

In the *Triennial Review Order*, the FCC adopted specific rules governing conversions as well as service eligibility for EELs, including conversion charges. FCC Rule 51.316(c) (47 C.F.R. § 51.316(c)), governing conversions, states:

Except as agreed to by the parties, an incumbent LEC shall not impose any untariffed termination charges, or any disconnect fees, re-connect fees, or charges associated with establishing a service

¹ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696 (1999).

² Supplemental Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 1760 (1999).

³ Supplemental Clarification Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696 (2000).

for the first time, in connection with any conversion between a wholesale service or group of wholesale services and an unbundled network element or combination of unbundled network elements.

Paragraph 587 of the *Triennial Review Order* discusses the FCC's reasoning for adoption of this rule. The FCC lists the charges in the rule, and states that

[S]uch charges could deter legitimate conversions ... or could unjustly enrich an incumbent as a result of converting a UNE or UNE combination to a wholesale service. Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNE and UNE combinations on just, reasonable, and nondiscriminatory rates, terms and conditions. Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or harm. (footnotes omitted).

Based on the FCC Rule 51.316(c) and the FCC's discussion of the reasoning for such rule, US LEC believes that BellSouth no longer has authority to impose the

“switch-as-is” charge unless US LEC agrees to such assessment. US LEC does not agree to be charged such a fee.

**ISSUE A-6: PROCESS FOR ASKING BELL SOUTH TO PERFORM ROUTINE
NETWORK MODIFICATIONS AND APPLICABLE CHARGES FOR
PERFORMING SUCH MODIFICATIONS**

**Q: WHAT ARE US LEC’S CONCERNS REGARDING BELL SOUTH’S
PROCESS FOR REQUESTING ROUTINE NETWORK
MODIFICATIONS PERFORMANCE?**

A: BellSouth has agreed to perform Routine Network Modifications as required by the FCC’s rules and to perform such modifications with no additional charges if BellSouth has anticipated the modifications. However, in the event that the Routine Network Modification has not been anticipated, BellSouth would require US LEC to submit a Service Inquiry to have the work performed. Such requests would be on an individual case basis. BellSouth would provide a price quote, and upon receipt of payment, BellSouth would perform the Routine Network Maintenance. US LEC is concerned that BellSouth will utilize its mandated requirements contained in this section as an opportunity to require all Routine Network Modifications be subject to a Service Inquiry, including the requirement of pre-payment for performance of such work with at a quoted price that is neither TELRIC compliant nor Commission approved. US LEC sees this as an attempt to

convert a function that BellSouth is required to perform, and performs in the ordinary course of business when it provisions DS1 and DS3 loops or dedicated transport for BellSouth's retail customers, into process more akin to the to a "bona fide request" process contained in the parties' interconnection agreement. Such additional requirements delay the provisioning of high-capacity facilities.

BellSouth is very aware that provisioning intervals are a very important aspect of "winning" customers. For example, if a UNE cannot be provisioned in a specific time to meet a customer's due date, US LEC may elect to cancel its UNE DS1 order and re-submit the order for a special access DS1 circuit. Once the order is no longer a UNE, but special access, BellSouth would then perform the necessary routine network modifications to the facility without any special request or inquiry from US LEC to turn up the service. In the end, US LEC is required to pay more for the circuit to meet its customer's install date, and than has to undertake the conversion process of special access to UNEs/EELs, adding additional time and costs to serve its customers.

Q: WHAT RATES SHOULD BE CHARGED FOR ROUTINE NETWORK MODIFICATIONS?

A: The FCC left it to the state commission's determination whether the cost should be recovered from a CLEC through a recurring charge, a non-recurring charge, or not all. To the extent that BellSouth's rates for a loop or transport already include

the costs of routine network modifications, which US LEC argues they do, no additional charges should be imposed on US LEC for completion of such modification. For those cases where BellSouth has not anticipated the modification, and needs to recover the cost, BellSouth should not be permitted to arbitrarily and unilaterally decide the charge.

Additionally, US LEC objects to the pre-payment of the charge, which is another attempt to delay the provisioning. US LEC is billed on a monthly basis for non-recurring and recurring charges associated with the UNEs that it purchases from BellSouth, and these non-recurring charges should be no different.

**ISSUE A-21: ADOPTION OF AN EXISTING, APPROVED AGREEMENT
PRIOR TO EXECUTION OF A TRO AMENDMENT**

**Q: EXPLAIN THE STEPS THAT US LEC TOOK TO NEGOTIATE NEW
INTERCONNECTION AGREEMENTS WITH BELL SOUTH.**

A: In or around March 2003, BellSouth sent US LEC notice that indicating that the current interconnection between the parties would expire on December 31, 2003, and initiated the renegotiation of a new agreement. Based on the notice, US LEC considered its options, and, in August 2003, US LEC decided that it would adopt an existing, approved interconnection agreement rather than negotiate a new agreement. On August 20, 2003, US LEC sent an adoption agreement to

BellSouth requesting to adopt the Time Warner agreement, except US LEC sought to revise one paragraph of the agreement in an effort to preserve language previously agreed to by the parties, and currently contained in the parties interconnection agreements, whose sole purpose was to resolve previous and potential billing disputes between the companies relative to BellSouth's obligation to provide billing records in exchange message record format. On September 3, 2003, BellSouth rejected US LEC's requested revision. On September 19, 2003, BellSouth forwarded an adoption agreement for US LEC's execution.

Prior to the initiation of the renegotiations of the interconnection agreement, on February 20, 2003, the FCC had adopted the *Triennial Review Order*. The text of the Order was not publicly released until August 21, 2003. Nevertheless, most carriers understood that the FCC's decision would result in changes to the arrangements between ILECs and CLECs in the provisioning of UNEs and combinations of UNEs. The Order was published in the Federal Register on September 2, 2003. On the same date, the FCC issued a public notice advising that the *Triennial Review Order* and the associated revised rules implementing the decisions would be effective as of October 2, 2003. Consequently, on September 19, 2003, when BellSouth forwarded the adoption agreements for execution, it was aware that the *Triennial Review Order* would be effective in less than 2 weeks from the date the adoption agreement was forwarded. At no time prior to October 2, 2003, did BellSouth advise US LEC that the adoption agreement was

required to be executed by both parties prior to the October 2, 2003 date, or BellSouth would not permit US LEC to adopt the agreements without an executed TRO Amendment.

In fact, there was one BellSouth state in which there was no existing, approved ICA – Mississippi – as of September 19, 2003. On October 17, 2003, US LEC found that the Time Warner agreement that it sought to adopt in Tennessee had been amended to include Mississippi. US LEC asked BellSouth to adopt the agreement, and asked the procedure for doing so. US LEC was advised that the prior adoption agreement that had been forwarded in September 2003 need only be revised to add “Mississippi” and that the BellSouth negotiator was working on revising the agreement. At no time was US LEC advised that it could not execute the adoption agreement unless it has an executed TRO Amendment, even though at the time of the exchange, the *Triennial Review Order* was in effect and US LEC has requested to negotiate a TRO Amendment.

Nonetheless, US LEC did forward to BellSouth a request to negotiate a TRO Amendment and provided a proposed amendment document. The notice was sent to BellSouth on October 8, 2003. Although BellSouth acknowledged the receipt of the request and the document, BellSouth advised US LEC that BellSouth would negotiate from a document prepared by BellSouth. US LEC did not receive the document until December 12, 2003. In addition, in November 2003, US LEC met with BellSouth, and agreed the parties would extend the expiration

271 of the Interconnection Agreements for an additional 60 days in an effort to reach
272 agreement on a TRO amendment. US LEC interpreted this to mean that the
273 expiration date of the interconnection agreement was extended until the end of
274 February 2004.

275
276
277 In January 2004, it appeared that negotiations of the TRO Amendment might
278 extend beyond the February expiration date of the Interconnection Agreement.
279 Accordingly, US LEC prepared an adoption agreement to adopt the Time Warner
280 agreement, executed it, and forwarded it to BellSouth for execution. US LEC was
281 advised that BellSouth would not permit the adoption of the agreement until and
282 unless a TRO Amendment had been executed.

283
284 **Q: ON WHAT BASIS DOES US LEC BELIEVE IT HAS THE RIGHT TO**
285 **ADOPT THE AGREEMENT?**

286
287 **A:** Section 252(i) of the Communications Act of 1934, as amended by the
288 Telecommunications Act of 1996 ("Act"), provides that:

289
290 A local exchange carrier shall make available any interconnection
291 service, or network element provided under an agreement
292 approved under this section to which it is a party to any other

requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Section 51.809(a) of the FCC's rules states that:

An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement.

The Time Warner agreement was executed by BellSouth and Time Warner on January 23, 2003, and has been approved by this Commission. The initial term of the agreement was for 3 years, and the 3 year term expires on or about January 2006. US LEC is willing to adopt the entire agreement, including amendments thereto, and is not seeking to revise the agreement. Thus, US LEC is seeking to exercise its right under the Act and the FCC rules.

Moreover, the Time Warner agreement has a change of law provision that provides the ability for BellSouth to require US LEC to engage in negotiations to amend the agreement to conform to any change of law. Therefore, BellSouth's interests are protected, especially in light of the fact that US LEC and BellSouth were already in negotiations for a TRO Amendment.

US LEC also offered to enter into an interim agreement with BellSouth to provide that BellSouth would not be required to offer any UNEs or combinations of UNEs not required to be offered under the revised FCC rules, and that US LEC would agree to order EELs or convert EELs based on the revised service eligibility requirements and that US LEC would not seek to commingle UNEs with wholesale services until the TRO Amendment was executed. BellSouth rejected the proposal, and countered with its own options: (1) US LEC bide its time and adopt the agreement when Time Warner had executed a TRO Amendment; or (2) US LEC adopt the agreement with the template TRO Amendment, and when Time Warner executed its amendment, US LEC would agree to adopt that Amendment. These options were not acceptable to US LEC as they only benefited BellSouth and placed US LEC at risk.

Q: ARE YOU AWARE WHETHER TIME WARNER HAS COMPLETED ITS NEGOTIATIONS WITH BELL SOUTH AND EXECUTED A TRO AMENDMENT?

A: To my knowledge and belief, Time Warner has not completed its negotiations and there has been no TRO Amendment executed or filed. In February 2004, we understood that the completion of negotiations was close and only a few issues remained open. However, we further understand that after the D.C. Circuit Court

338 of Appeals decision was issued on March 2, 2004, the negotiations ceased
339 temporarily and we are unsure where that negotiations stands at this time.

340

341 **Q: DOES THIS END YOUR DIRECT TESTIMONY?**

342

343 **A:** Yes.